

The Administrative Law Judge granted claimant an award for workers compensation benefits, including permanent partial disability compensation for a 15 percent scheduled injury to the left arm. Respondent appeals alleging that the claimant had failed to prove respondent had sufficient payroll to come under the Workers Compensation Act and, if the

claim is found compensable, respondent also seeks review of the Judge's findings concerning the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds that the Administrative Law Judge's Award should be reversed. Claimant has failed to prove respondent had a total gross annual payroll for the preceding calendar year of at least \$20,000 or that the respondent reasonably estimated that its gross annual payroll for the 1996 calendar year would likely be more than \$20,000.

Claimant alleges a February 15, 1996 injury at work when he hit his elbow on a dumpster. Respondent argues that claimant failed to meet his burden of proving respondent had sufficient payroll to come under the Act. K.S.A. 44-505(a) provides:

[T]he Workers Compensation Act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

(2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

Claimant testified he was hired the first part of 1996 by respondent. But later said it was the latter part of 1995. Claimant said he missed two or three weeks of work after the accident and then returned to work for respondent. He testified that he would work anywhere from 30 to 60 hours per week earning \$10 per hour. But this testimony was contradicted by a document claimant introduced and purported to be an unemployment insurance document (Exhibit 1 to the October 16, 1997 Continuation of Regular Hearing) that showed his earnings from Accent Roofing were \$1,520 during the third quarter of 1995 and \$1,536 during the fourth quarter of 1995. There were no earnings shown for the first two quarters of 1996 and there were no other entries showing earnings from respondent for any other time periods. There is no evidence as to how many employees respondent had for the 12 months prior to this accident. Claimant said that the respondent had about five employees working on the job site when he was injured. Claimant also testified that the respondent had as many as eight employees at one time but not on a continuous basis.

Other than the alleged unemployment record, there were no paycheck stubs, payroll records, wage statements, or other documentation of respondent's payroll placed into

evidence. Respondent presented no evidence on the payroll issue. Respondent argues that claimant presented no credible evidence on that issue because claimant guessed at the number of employees employed by respondent and their hourly rate of pay.

Joseph Aguirre testified that he was claimant's supervisor at Accent Roofing. He worked for other employers during the same years that he worked for Accent Roofing because there was not enough work to keep him busy full time, especially during the winter months. Mr. Aguirre believes that he started off at about \$10 per hour in 1991 and was getting \$12.50 or \$13.00 per hour when he left in 1996.

Gerardo Fernandez testified that he worked for respondent off and on for about four years and earned \$6.00 an hour when he started and was making \$11.00 an hour when he left. In 1996 he was paid at the rate of \$10.00 per hour. According to Mr. Fernandez, only he, the claimant, and the owner, Pete Nanneman, were present at the job site when claimant was injured. Furthermore, Mr. Fernandez does not recall claimant returning to work after his accident. Neither Mr. Aguirre nor Mr. Fernandez were asked how many workers were generally on a crew, how many hours per week they worked or how many weeks they were employed by respondent in any given year.

A workers compensation claimant has the burden of proof to establish the right to an award of compensation and to prove those conditions on which the claimant's right depends. The burden of proof is the obligation to persuade the factfinder by a preponderance of the credible evidence that a party's position is more probably true than not true on the basis of the entire record. Fetzer v. Boling, 19 Kan. App. 2d 264, 267, 867 P.2d 1067 (1994).

Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded . . . in a workers' compensation case unless it is shown to be untrustworthy; and such uncontradicted evidence should ordinarily be regarded as conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978).

The Appeals Board finds that claimant's testimony concerning the number of hours per week and the number of weeks that he worked for respondent is not credible. This testimony is contradicted by claimant's own exhibit No. 1 and by the testimony of Mr. Aguirre and Mr. Fernandez. To the extent claimant's testimony is not contradicted, it fails to prove that respondent had a sufficient annual payroll to come under the mandatory provisions of the Act. The record further fails to establish that respondent filed an election to come under the Act or otherwise purchased workers compensation insurance coverage.¹

¹ There was some indication that respondent may have had workers compensation insurance coverage with either Continental Casualty Company or Commercial Insurance Company of Newark, NJ but that was never proven and respondent denied having any insurance coverage.

Based upon the record presented, claimant has not met his burden of proving that respondent had sufficient payroll to be subject to the provisions of the Workers Compensation Act.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated August 3, 1998, should be, and is hereby, reversed.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and the Workers Compensation Fund to be paid as follows:

Hostetler & Associates, Inc.

\$916.35

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Wonder, Kansas City, MO
Mark E. Kolich, Kansas City, KS
Terri Z. Austenfeld, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director